# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1071.

THE UNITED STATES, APPELLANTS,

vs.

GEORGE E. HENDEE.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1887.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1887.

## No. 1071.

---

THE UNITED STATES, APPELLANTS,

vs.

GEORGE E. HENDEE.

---

APPEAL FROM THE COURT OF CLAIMS.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Petition, filed December 20, 1886 | 1 | 1 |
| Traverse | 4 | 2 |
| Findings of fact and conclusion of law | 5 | 2 |
| Opinion of the court | 7 | 4 |
| Final judgment | 11 | 7 |
| Application of defendants for and allowance of appeal | 12 | 7 |
| Certificate | 13 | 8 |

In the Court of Claims.

I.—*Petition.*

GEORGE E. HENDEE
*vs.*
THE UNITED STATES. } No. 15423.

To the honorable the Judges of the Court of Claims:

The petition of George E. Hendee respectfully shows to your honors that he is a citizen of the United States and an officer of the Navy thereof, to wit, a paymaster, and that his military history is as follows:

Paymaster's clerk, Oct., 1861, to December, 1862, and from Aug., 1863, to Febr'y, 1864; acting assistant paymaster, 25 March, 1864; passed assistant paymaster, 23 July, 1866; paymaster 27 February, 1869.

Your petitioner further says that the lowest grade having graduated pay held by him since last entering the service is, under the act of July 15th, 1870 (R. S., sec. 1556), that of paymaster, and that the pay of said grade is as follows:



| | At sea. | On shore. | On leave. |
|---|---|---|---|
| 1st 5 years after date of commission | 2,800 | 2,400 | 2,000 |
| 2d " " " " " " | 3,200 | 2,800 | 2,400 |
| 3d " " " " " " | 3,500 | 3,200 | 2,600 |
| 4th " " " " " " | 3,700 | 3,600 | 2,800 |
| After 20 " " " " " | 4,200 | 4,000 | 3,000 |

You petitioner says that he is, under the provisions of the acts of August 5th, 1882, and March 3d, 1883 (22 Stats., 287 and 473), entitled to have credit given him upon his said grade of paymaster for all of his service as above stated, prior to the date of his said commission as a paymaster, to wit: 6 years, 5 months, and 26 days, and that he is entitled to the difference of pay, resulting from such credit, to wit, to the sum of $—, all of which remains due and unpaid, for which amount he asks judgment.

Your petitioner further says that he is the sole owner of this claim, and has never assigned the same, or any part thereof, to any person; that he has never borne arms against, or given aid or comfort to rebellion against, the Government of the United States, and that he is entitled to the amount herein claimed, after allowing all just credits and offsets.

GEORGE E. HENDEE,
By J. P. JONES, *Atty.*

3 DISTRICT OF COLUMBIA, *ss:*

John Paul Jones, being first duly sworn, says that he is the attorney of George E. Hendee, and that the matters stated in the foregoing petition are true, to the best of his knowledge and belief.

JOS. W. AMAN,
*Comm'r Ct. Cls.*

4 II.—*Traverse.*

In the Court of Claims of the United States. December term, A. D. 1886.

GEORGE E. HENDEE,
*vs.*
THE UNITED STATES. } No. 15423.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as ayers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
*Assistant Attorney-General.*

5 III.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant was, on the 3d of March, 1883, and still is, a paymaster in the Navy. Previously thereto he had served in the Navy as follows: Paymaster's clerk from October 10, 1861, to November 30, 1862, and from October 30, 1863, to March 5, 1864; acting assistant paymaster, from April 26, 1864, to July 23, 1866; passed assistant paymaster, from July 23, 1866, to February 27, 1869; paymaster, from February 27, 1869.

II.

Under the provisions of the act of March 3, 1883, ch. 97 (22 Stat. L., 472, 473), relating to the credit to officers for length of service, there is due, and unpaid, the claimant the sum of $8,178.01, if he be entitled to have credited to him under said act the time he served as paymaster's clerk as aforesaid, and the sum of $6,313.77 if he be not entitled to be so credited.

III.

The practice of the Navy Department has not been uniform as to the classification of paymasters' clerks and their designation as officers or otherwise, but in several regulations, orders, and official documents they have been designated as officers. The following are copies of official orders:

[General Order 153.]

"NAVY DEPARTMENT,
"*April* 18, 1870.

"Secretaries to Commanders-in-Chief, clerks to commanding officers, and clerks to paymasters are officers of the Navy, within the meaning of the law, and are therefore entitled, under orders from their appointing officers, to 10 cents per mile for travel performed within the United States. * * Clerks in the Navy pay offices are civil employees, and not entitled to mileage. * * *"

Upon change of the law substituting actual expenses for mileage the following order was issued:

[General Order 193.]

"NAVY DEPARTMENT,
"*April* 5, 1875.

"General Orders No. 153, of April 18, 1870, is hereby annulled. When an officer of the Navy, who is entitled to a secretary or clerk, appoints him from civil life and desires him to report for duty at any given
6 place, the Department, if it approves thereof, will issue the requisite order on receiving official notice of his appointment and request for such orders.

"All officers, including secretaries and clerks, serving on board ships in commission, will receive orders which involve traveling expenses from their commanding officer, senior officers present, commander-in-chief, or from the Department, as the case may be."

Paymasters' clerks are charged with the 20 cents per month hospital dues imposed by Revised Statutes, section 4808, and the following is a copy of an official letter on the subject on file in the office of the Fourth Auditor from the Secretary of the Navy:

"NAVY DEPARTMENT,
"*February* 9, 1882.

"SIR: Your letter of the 21st ultimo, inclosing a communication from Passed Assistant Paymaster J. W. Jordan, U. S. Navy, in regard to pay clerks at navy-yards and naval stations, has been received.

"In reply you are informed that pay clerks, appointed under authority of sections 1380, 1387, and 1388, Revised Statutes, and in the manner prescribed by the Navy regulations, are entitled to medical attendance, and in cases of necessity, to hospital treatment. Twenty cents per month should be deducted from their pay to be applied to the fund for Navy hospitals, as is required by section 4808, Revised Statutes.

"The letter of Passed Assistant Paymaster Jordan, with a copy of U. S. Navy Regulation Circulars, Nos. 21 and 29, are inclosed.

"Very respectfully,

"WM. H. HUNT,
"*Secretary of the Navy.*

"Hon. CHAS. BEARDSLEY,
"*Fourth Auditor.*"

CONCLUSION OF LAW.

Upon the foregoing finding of facts the court decides, as a conclusion of law, that the claimant is entitled to credit for the time he served as paymaster's clerk, and to judgment for the sum of $8,178.01.

7 IV.—*Opinion of the court.*

RICHARDSON, Ch. J., delivered the opinion of the court:

The act of March 3, 1883, ch. 97 (22 Stat. L., 472, 473), provides that "all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous, and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service."

The claimant brings this action to recover the amount due him on account of the additional credit allowed by this provision. (Hawkins' Case, 19 Ct. Cls., 611; Bradbury's Case, 20 Ct. Cls., 187; Rockwell's Case, 21 Ct. Cls., 832.)

Two computations, set out in the findings, have been furnished by the Treasury Department, which the parties accept as correctly made upon the different constructions of the act as contended for on the one side and the other. The larger sum includes credit for the time while the claimant was a paymaster's clerk, and is the amount demanded by him. The smaller sum omits that credit, and is the amount which the defendants contend is all that is due him.

The issue raises the single question of law, whether or not a paymaster's clerk is an officer in the Navy within the meaning of said act.

Article 2, section 2, of the Constitution declares that the President

"shall nominate, and by and with the advice and consent of the
8 Senate, shall appoint embassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein provided for, and which shall be established by law."

There is no doubt but that all persons thus appointed are officers of the United States of the highest and most pronounced type, but other persons in the employment of the Government and not so appointed are, by statutes and departmental regulations, in some cases called and recognized as also officers. The word is frequently used in a broader sense than the technical one fixed by the constitutional method of appointment, and that use of it is occasionally found in statutes, in opinions of the Supreme Court, and in the regulations and orders of the Navy Department.

In the case of Germaine (99 U. S., 508), relied upon by the defendants, the Supreme Court held that civil surgeons appointed by the Commissioner of Pensions to make examination of pensioners when necessary, and to be paid by fees in each case of examination, were not officers of the United States within the meaning of section 12 of the act of 1825 (4 Stat. L., 118), which provided that "every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine," &c. They took into consideration, however, in the opinion by Mr. Jus-

tice Miller, not only the fact that the surgeon was not appointed as provided by the Constitution, upon which the opinion mainly rests, but also the nature of his employment and the circumstance that the statute under which he was convicted was a penal one, which, of course, by the well-established rules of construction, required a strict interpretation. It is there said:

"If we look to the nature of the defendant's employment, we think it equally clear that he is not an officer. In that case [United States v. Hartwell, 6 Wall., 385] the court said the term embraces the idea of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us the duties are not continuing and permanent, and they are occasional and intermittent. The surgeon is only to act when called upon by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions, of which we are not advised."

In the case of Reed (100 U. S., 13), when a paymaster's clerk was tried and convicted by a court-martial under one of the articles for the government of the Navy, it was necessary only to determine whether or not the defendant was "a person in the naval service," but Mr. Justice Swayne, in the opinion of the court, uses this significant language:

"The place of paymaster's clerk is an important one in the machinery of the Navy. Their appointments must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the Navy must be in writing and filed in the Department. They must take an oath and bind themselves to serve until discharged; they are required to wear the uniform of the service; they have a fixed rank, and they may become entitled to a pension and to bounty land. If these officers are not in the naval service, it may well be asked who are."

These opinions strongly imply that there may be persons in the employment of the Government who from the tenure of service, nature of employment, and duties, may be known and sty'ed as officers for some purposes and in some connections, though not technically so by appointment under the provisions of the Constitution.

9 We are now dealing with a remedial statute and the claimant is entitled to a liberal interpretation, giving to the language as broad meaning as Congress may be presumed to have used it in connection with the subject-matter; and we may take into consideration other statutes on the same subject, as well as the practice of the Navy Department to which it relates, without being confined to that technical accuracy in the meaning of words which is required in penal statutes (Farden's Case, 13 C. Cls., 347, affirmed on appeal).

We find in the Navy a class of officers called "petty officers," recognized as such by the statutes (Rev. Stats., 1410), but without any statute provision as to how they shall be appointed. By the regulations they are appointed by or with the approval of the commander of the vessel on which they are employed. We hardly think any one would doubt that such officers are entitled to the benefits of the act we are now considering.

The same section of the Revised Statutes (§ 1410) which defines who are petty officers, also most clearly classes clerks as officers not holding commissions or warrants, and not entitled to them, but still officers of the Navy. It provides that "all officers not holding commissions or warrants, or who are not entitled to them, except * * * and except secretaries and clerks, shall be deemed petty officers." * * *

"An exception must be part of the thing previously described and not of some other thing (Bouvier's Law Dictionary)." Excepting clerks, therefore, from those officers who would otherwise be petty officers, leaves them classed among the officers previously described.

If we consider the appointment, nature of service, and duties, we find that paymasters' clerks are regularly appointed by and with the approval of superior officers (Navy Regulations of 1876, sec. 3, par. 9, p. 95), that they receive annual salaries fixed by statute (R. S., § 1056), take an oath, have continuing and permanent duties until discharged by the same power that appoints them, and otherwise come within the idea implied by the term officers as described by Mr. Justice Miller in the Germaine Case.

In the Navy Regulations, of which we take judicial notice, those of 1865, clerks were expressly enumerated under the title of "Line and staff officers with their relative rank," and in rank were classed with midshipmen (Art. 2, pars. 5, 22).

In the more recent regulations of 1876 they seem to have no classification. But in several orders and official papers of the Secretary of the Navy they are referred to and treated as officers. In two orders set out in the findings they are expressly so designated, and by letter from the Secretary to the Fourth Auditor under date of February 9, 1882 (Finding III) they are held subject to the provisions of Revised Statutes, section 4808, which are as follows:

"SEC. 4808. The Secretary of the Navy shall deduct from the pay due each officer, seaman, and marine in the Navy, at the rate of twenty cents per month for each person, to be applied to the fund for Navy hospitals."

If they are subject to this tax it is because they are held to be officers of the Navy; and if they are so held for the purpose of taxation for the support of Navy hospitals, they ought to be so held for the purpose of receiving benefits under the longevity statute which confers such benefits upon "all officers of the Navy."

In the case of In re Bogart, tried in the circuit court, district of
10 California, Judge Sawyer considered the position in the Navy of a paymaster's clerk, and in his opinion thus refers to it:

"Was the petitioner, while a clerk of the paymaster in the Navy, on duty in the manner before stated, a person in the naval forces of the United States within the meaning of this act? It is contended on his behalf that he is not. But upon this point we entertain no doubt. He was not merely an employé or servant of the paymaster, but, on the contrary, as we have seen from the regulations of the Navy, set out in the statement of facts, he was an officer in the Navy. He received his position by appointment, which appointment was required to be approved by the commander of the ship. He was required to give a written acceptance, in which he bound himself to be subject to the laws, regulations, and discipline of the Navy, which acceptance is required to be filed in the Department. He was required to qualify by taking an oath, and to expressly

engage to serve till regularly discharged; and this could only be done by the appointing power, approved in the same manner as his appointment had been approved.

"He was an officer of the same class as the paymaster himself, the surgeon, engineer, &c., viz, a staff officer; and he ranked with midshipmen, who are line officers. (3 Sawyer C. C. R., 407.)"

In our opinion the benefits allowed by the act of 1883 to officers of the Navy apply not only to those who are strictly and technically such by appointment as provided by the Constitution, but to all who are called, recognized, or treated as such by the statutes, the regulations, or the practice of the Navy Department, and that paymasters' clerks are among the latter class.

The claimant is entitled to credit for the time he was paymaster's clerk, and will have judgment for the sum computed upon that interpretation, $8,178.01.

NOTT, J.,

I am of the opinion that the claimant should recover for the reasons set forth by his counsel's brief.

11 V.—*Final judgment.*

In the Court of Claims.

GEORGE E. HENDEE
*vs.*
THE UNITED STATES. } No. 15423.

At a Court of Claims held in the city of Washington on the 14th day of March, A. D. 1887, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said George E. Hendee do have and recover of and from the United States the sum of eight thousand one hundred and seventy-eight $\frac{01}{100}$ ($8,178.01).

12 VI. *Application of defendants for and allowance of appeal.*

In the Court of Claims of the United States, Dec. term, 1886.

GEORGE E. HENDEE
*vs.*
THE UNITED STATES. } No. 15423.

From the judgment rendered in the above-entitled cause on March 14, 1887, in favor of claimant, the defendants, by their Attorney-General, on the 13th day of May, 1887, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
*Assistant Attorney-General.*

Filed May 13, 1887.
Allowed in open court May 16, 1887.

13 VII.—*Certificate.*

In the Court of Claims.

GEORGE E. HENDEE
*vs.*
THE UNITED STATES. } No. 15423.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the final judgment, and of the application for and allowance of an appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 23d day of August, 1887.

[SEAL.] ARCHIBALD HOPKINS,
*Chief Clerk Court of Claims.*

(Indorsement on cover:) No. 1071. The United States, appellant, vs. George E. Hendee. Court of Claims. Filed September 27, 1887.

FILED.
NOV 17 1887
JAMES H. McKENNEY.
CLERK.

# In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
GEORGE E. HENDEE. } No. 1071.

*APPEAL FROM THE COURT OF CLAIMS.*

**STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF OF ARGUMENT OF APPELLANT.**

# In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
*vs.*
GEORGE E. HENDEE.
No. 1071.

*APPEAL FROM THE COURT OF CLAIMS.*

## STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF OF ARGUMENT OF APPELLANT.

### STATEMENT OF THE CASE.

This is an appeal from a judgment rendered by the Court of Claims in favor of George E. Hendee against the United States on the 14th day of March, A. D. 1887, for the sum of $8,178.01.

Claimant is a paymaster in the U. S. Navy. He has served in the regular and volunteer Navy since October 10, 1861. From October 10, 1861, to November 30, 1862, his position was that of paymaster's clerk. He claims credit in the grade of paymaster for length of service under the provisions of a clause of the *Naval Appropriation Act of March* 3, 1883 (22 Stat. L., 473), as follows:

> And all officers of the Navy shall be credited with the actual time they may have served as officers or

> enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects and in the same manner as if said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service.

If he is entitled to have credited to him under said act the time he served as paymaster's clerk he should, according to the calculation of the accounting officers of the Treasury, have been credited at the time of the institution of this suit with the sum of $8,178.01.

If he is not entitled to credit for the time he served as a paymaster's clerk, he should (according to same calculation) have had credit for the sum of $6,313.77.

The amount, therefore, in controversy is $1,864.24.

This amount the accounting officers refused to allow, on the ground that a paymaster's clerk is neither an officer nor enlisted man in the Navy, and as a consequence the time of an officer who has been a paymaster's clerk is not entitled to be computed under the provisions of said act of March 3, 1883, *supra*. Claimant filed his petition in the Court of Claims to recover the whole amount he alleges to be due him, to wit, the said sum of $8,178.01. Judgment was rendered in his favor for that amount.

---

ASSIGNMENTS OF ERROR.

The court erred—

(1) In holding, viz:

> The benefits allowed by the act of 1883 to officers of the Navy apply not only to those who are strictly

and technically such by appointment as provided by the Constitution, but to all who are called, recognized, or treated as such by the statutes, the regulations, or the practice of the Navy Department, and that paymasters' clerks are among the latter class.

(2) In finding, as a conclusion of law:

The claimant is entitled to credit for the time he was paymaster's clerk, and will have judgment for the sum computed upon that interpretation—$8,178.01.

(3) In ordering, adjudging, and decreeing "that the said George E. Hendee do have and recover of and from the United States the sum of $8,178.01."

---

BRIEF OF ARGUMENT.

As stated by his honor the Chief Justice in rendering the opinion of the court below, "the issue raises the single question of law whether or not a paymaster's clerk is an officer of the Navy within the meaning of said act." (*Act 3d March*, 1883, 22 Stat. L., 473, *supra*.)

It is claimed on the part of the United States that a paymaster's clerk—

(1) Is not an officer within the provisions of the Constitution of the United States;

(2) Is not an officer, recognized as such by Congress or naval regulation; and

(3) That an enlisted man or a person not otherwise connected with the Navy may hold the position of paymaster's clerk.

*A paymaster's clerk is not an officer within the provisions of the Constitution of the United States.*

Article II, section 2, of the Constitution provides that the President "shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments."

A clerk is allowed by law to certain paymasters in the Navy. (Rev. Stat., §§ 1886, 1887, 1888.)

The manner of the appointment of such clerk is fixed by the Naval Regulations (Nav. Reg., 1876, par. 9, p. 95) as follows:

> No person will be appointed a secretary who is not twenty-one years of age, nor a clerk who is under eighteen. Officers who nominate secretaries or clerks will be responsible for their character and fitness. Every officer entitled to a secretary or clerk may nominate him; but the appointment or discharge of a clerk by any officer not in command is subject to the approval of the commanding officer; the latter, however, will not refuse his approval except for good and sufficient reasons, which he will state in writing to such officer. No secretary or clerk will be entered upon the muster-roll of any vessel, nor be entitled to any pay, until he shall have accepted his appointment by letter, in duplicate, binding himself therein to be subject to the laws and regulations for the government of the Navy and the discipline of the vessel. One of these letters is to be transmitted im-

> mediately to the Department by the officer conferring the appointment, together with the oath of allegiance; the other copy will be preserved by that officer. In the case of any clerk appointed by an officer not in command, the letter of acceptance sent to the Department must bear the approval of the commanding officer. The acceptance of an appointment as secretary or clerk shall be understood as binding such person to serve with the officer who appointed him until regularly discharged. Should an enlisted man be appointed as clerk, the appointment does not release him from his enlistment.

A paymaster's clerk is neither an officer "of the highest and most pronounced type" nor such "inferior officer" referred to in the Constitution, whose appointment Congress may by law vest "in the President alone, in the courts of law, or in the heads of Departments." He receives his appointment from the paymaster, who is himself subordinate to the head of a Department. The paymaster is "responsible for his character and fitness." The acceptance of the position by the clerk only binds him "*to serve with the officer* who appoints him until regularly discharged." He is simply an employé, to aid the individual paymaster by whom he is appointed in the discharge of his duties. There is nothing in his duties which require any more knowledge in him of the parts of a ship or naval detail than would be required of any other passenger.

His appointment or discharge does not require the approval of the head of the Department. It is subject alone to the approval of the commanding officer, who is not empowered to disapprove "except for good and sufficient reasons, which he will state in writing."

Upon the authority of *Moore's Case* (95 U. S., 760), cited by the court in the opinion rendered in the Mouat Case (decided at the last term of the Court of Claims, and now on appeal to this court), it is claimed "it may be that the claimant (paymaster's clerk) should be held to be an officer in the constitutional sense of the term."

Moore was a passed-assistant surgeon of the Navy; not, as in the case at bar, a clerk to an officer of the Navy. It was held by this court that he was appointed by the Secretary of the Navy under authority of law. Swayne, J., says: "The place has every ingredient of an office, and the appellee was legally appointed to it."

That an "inferior officer" must be appointed by the head of a Department is recognized and asserted in *United States* vs. *Hartwell* (6 Wall., 385), cited in the opinion of the court below. The term office, as there held, "embraces the idea of tenure, duration, emolument, and duties;" "duties continuing and permanent, not occasional and temporary." The employment must be in the United States service.

The term of office of a paymaster's clerk is dependent upon the service of the officer appointing him. Upon the question of tenure this court held (Hartwell Case, *supra*), as to Hartwell "vacating the office of his superior would not have affected the tenure of his place."

And further, "the defendant was appointed by the head of a Department within the meaning of the constitutional provision upon the subject of the appointing power."

There was a dissenting opinion in the Hartwell Case, rendered by Mr. Justice Miller, in which Justices Grier and Field concurred.

In the case of *United States* vs. *Germaine* (99 U. S., 508), it was held that civil surgeons appointed by the Commissioner of Pensions under section 4777, Revised Statutes, are not officers of the United States. It was decided in this case that the Commissioner of Pensions is not the head of a Department within the meaning of section 2, article 2, of the Constitution.

Mr. Justice Miller, in delivering the opinion of the court, says "*United States* vs. *Hartwell* is not, as is supposed, in conflict with these views. It is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that Department, and he was therefore an officer of the United States."

*Ex parte Reed's Case* (100 U. S., 13) is not in point In that case the question was whether a paymaster's clerk who was tried and convicted by a court martial under one of the articles for the government of the Navy was "a person in the naval service." This court decided that he was.

Swayne, J., says:

> Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the Navy must be in writing, and filed in the Department. They must take an oath and bind themselves to serve until discharged. The discharge must be made by the appointing power and approved in the same manner as the appointment. * * * If these officers are not in the naval service it may well be asked who are.'

The words "these officers" are cited by the court below for the purpose of demonstrating that in the longevity

pay act Congress used the word "officers" in its general, popular, and broad signification, rather than in its narrow and technical one. It is not to be assumed that this court, by the use of the term "these offices," in a case where the rank of the employé was not in issue intended to overrule their decisions in the cases of Moore, Hartwell, and Germaine, *supra*, where the question as to what constitutes an officer of the United States was directly in issue.

As to who may be included in a statute under the term "officers" is clearly defined by the court in Germaine's Case, *supra*.

> The Constitution, for purposes of appointment, very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of Departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.

*In re Bogert* (3 Sawyer, C. Cls. R., 407) it was held that a paymaster's clerk was a person in the naval service. This is not disputed, and is in accord with the opinion of this court in *Ex parte Reed*, *supra*.

But it is submitted that the learned judge in *Bogert's Case* was in error in the statement, "He was an officer of

the same class as the paymaster himself," etc. The paymaster's clerk holds his position by virtue of an appointment from the paymaster and a contract signed by him, which is placed on file in the Department. The paymaster is appointed by the President and confirmed by the Senate. Section 1378, Revised Statutes, is as follows:

> All appointments in the Pay Corps shall be made by the President by and with the advice and consent of the Senate.

It is submitted that a paymaster's clerk is therefore not an officer within the provisions of the Constitution.

*He is not an officer recognized as such by Congress or naval regulation.*

Neither Congress nor the Navy Department are empowered to appoint officers except as provided by the Constitution.

> The Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest upon authority conferred by that instrument. (*Germaine's case, supra.*)

The Departments can not make laws; such authority is vested in Congress, subject to the approval of the President.

The contemporaneous interpretation, long continued in, by a Department of a doubtful law has been repeatedly decided by this court to be entitled to great respect. But if such interpretation is in opposition to the plain and manifest meaning and intent of the law, it is not sustained, however long it may have been enforced.

If Congress has not the power to create an office ex-

cept as provided for in the Constitution, it is certainly not within the legitimate exercise of power of the Navy Department to confer upon an employé not legally appointed as such the rights, duties, privileges, and benefits of an officer. If an employé is designated an officer either by Congress or the Department, such designation is simply by way of description, and confers no legal rank.

By Naval Regulations of 1865, paymaster's clerks were ranked with midshipmen. In the Naval Regulations of 1876, at present in force, they are not classified.

The Navy regulation that 20 cents per month shall be deducted from their pay "to be applied to the fund for naval hospitals" is not based upon the fact that they are officers, but for the reason that they are entitled to hospital treatment. (Letter February 9, 1882, Finding III, Rec., p. 8.)

It is submitted that if a paymaster's clerk is not an officer within the provisions of the Constitution, the fact that he may be so designated by either Congress or the Navy Department will not confer upon him the benefits of a law passed for the benefit of officers, without he is specifically embraced within the terms of the law.

*An enlisted man or a person not otherwise connected with the Navy may hold the position of paymaster's clerk.*

Paragraph 9, page 95, Navy Regulations of 1876, *supra*, provides: "Should an enlisted man be appointed as clerk, the appointment does not release him from his enlistment."

If an enlisted man is appointed paymaster's clerk he still bound by his enlistment, as well as by his contract

with the Government, entered into by virtue of his appointment by the paymaster and his letter of acceptance. But he is still an enlisted man, and as a consequence not an officer.

If neither an enlisted man nor constitutional officer, he is simply an employé in the naval service, "binding himself by contract to be subject to the laws and regulations for the government of the Navy and the discipline of the vessel."

As an enlisted man, he is amenable to naval laws and regulations by virtue of his enlistment. As paymaster's clerk, he is amenable to such laws and regulations by virtue of his contract (*Ex parte Reed, supra*).

*If it is admitted that a person who is not legally an officer of the Navy may be popularly so regarded because in special statutes or naval regulations he is so designated, no person so designated is embraced within the terms of the longevity pay act of* 3*d March*, 1883, *supra.*

Quoting from the act, "And all officers of the Navy shall be credited * * * in the lowest grade having graduated pay held by such officer since last entering the service," it is obvious that the term "officers" and "officer" are only applied to "officers" or "officer" who are such within the constitutional provision, for the reason that only such "officers" or "officer" are entitled to graduated pay.

In the first two lines in the act the words officers occur twice, viz: "And all officers of the Navy shall be credited with the actual time they have served as "officers," etc. As just argued, the words "officers of the Navy" in the

act designate officers who are such within the provisions of the Constitution. It is only by a strained construction of the statute that a different meaning can be given to the word "officers" the second time it is used to its obvious meaning when first used.

It is a familiar principle of interpretation that every part of a statute must be viewed in connection with the whole, so as to make all parts harmonious, if possible.

It is true that doubtful words, if not scientific or technical, are to be interpreted according to their familiar use and acceptance. But it is to be assumed that a statute enacted for the benefit of "officers of the Navy" is for the benefit of officers legally appointed, and not for the benefit of a class of employés because by accident they have in certain appropriation acts been classed as officers, or familiarly so termed by this court, as in the case of *Ex parte Reed, supra.*

The claimant in this case was not an enlisted man whilst paymaster's clerk.

During the period of such service it is submitted that he was neither an officer nor enlisted man, and that in his claim for longevity pay under the provisions of said longevity pay act of 3d of March, 1883, the period of such service should not be calculated.

A. H. GARLAND,
*Attorney-General.*

ROBERT A. HOWARD,
*Assistant Attorney-General.*

F. P. DEWEES,
*Assistant Attorney.*

-309
24-309

Office Supreme Court U. S.
FILED.
DEC 8 1887
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *Appellants*,
*vs.*
GEORGE E. HENDEE,
No. 1,071.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF FOR APPELLEE.

The question in this case is whether appellee, as a paymaster in the Navy, is entitled to be credited with his service as paymasters' clerk, and to receive the longevity pay resulting from such credit, under the following clause of the Naval Appropriation Act, of March 3, 1883. (22 Stats., 473).

SEC. 1. * * * * * * * *

"And all officers of the Navy shall be credited with the actual time they may have served *as officers or enlisted men* in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects, in the same manner, as if all said service had been continuous and in the regular Navy, in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided, further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in th e volunteer Army or Navy. * * * *

In *ex parte* Reed, (100 U. S., 13,) and *In re* Bogart. (3 Sawyer, C. C., 407,) it was decided that a paymasters' clerk was a person in the Naval Service, liable to court-martial. If he is either an officer or an enlisted man, then his service must be credited under the act of 1883, and the judgment below affirmed to its full extent. The question is similar to that involved in U. S. *vs.* Mouat, No. 1070 of this term.

In both the Reed and Bogart cases the court said, in language cited in the record, here (pp. 5 and 7,) that a paymasters' clerk was an officer. But it is contended that such language was *obiter*, and that appellee was not an officer.

1. In the sense of the Constitution, Art. II, Sec. 2.

2. In the sense of being recognized by statute or naval regulation.

The second point seems to be waived in the argument, which is devoted to showing that such recognition cannot make an officer of a person, who is not one, under the Constitution.

In U. S. *vs.* Moore (95 U. S., 760,) cited in the opinion below, it was held that a passed assistant surgeon, who was neither nominated and confirmed by the Senate (as all medical officers were required to be by Section 1369, R. S.), and whose appointment was not expressly vested by law in the president or head of the department, but was only impliedly so vested by sections 1474 and 1556, R. S., fixing his rank and pay, was an officer, and that a notification from the Secretary of the Navy that he would be thereafter "regarded" as a passed assistant surgeon, was a valid appointment to his office.

This would seem conclusive of the present case, since paymasters' clerks are recognized as officers in Sections 1410 and 1556, R. S., equally with passed assistant surgeons, as also in naval orders cited on page 3 of the record.

Their uniform is prescribed in an order cited on page 12 of the brief of counsel for appellee, in U. S. *vs.* Mouat, No. 1070, submitted with this case. From that brief (pp. 12 and 13) we also borrow references to the cases of U. S. *vs.* Tinklepaugh (3 Blatchf., 430), Vaugh *vs.* English (8 Cal., 41), U. S. *vs.* Maurice (2 Brock, 103), and *ex parte* Smith (2 Cranch, C. C., 693), which define the words office and officer, as used in various statutes.

Counsel for appellants distinguishes this case from U. S. *vs.* Moore, by assuming, on page 6 of his brief, that appellee was not appointed by the Secretary of the Navy, as Moore was. There is nothingin the findings of fact to support this assumption. On the contrary, general order 193, cited on page 3 of the record, indicates that a clerk's appointment must be approved by the head of the department, before he can enter upon his duties.

So, also, the paragraph of the regulations quoted on pages 3 and 4 of appellants' brief, while speaking in one place of the "appointment" by an officer, in another place calls it a "nomination," subject to the "approval" of the commanding officer, and directs its acceptance in all cases to be immediately sent to the department. For what purpose? evidently for the approval of the head of the department. While the appointment and acceptance in this case, having been lost, are not in this record, their form is shown at page 2 of record in U. S. *vs.* Mouat, to require the secretary's approval.

The case of U. S. *vs.* Hartwell, (6 Wall., 385,) cited by counsel, as well as the cases of Reed and Bogart, (*supra*) involved questions of criminal law, requiring a strict construction of statutes, while in this case, as was justly said by the court below, a remedial statute is involved and is to be liberally construed.

The evident object of the act of 1883, as argued in U. S. *vs.* Mullan, decided at this term, was to give officers, who had previous experience, an advantage in the matter of longevity or service pay, over those appointed from civil life. Surely of all classes of service for which credit is to be given, under the act of 1883, none could be so valuable to the government in the case of a paymaster, as service which he had rendered as paymasters' clerk. It meets the test laid down in Thornley *vs.* the United States, (18 Ct. Cls., 117,) as the basis for longevity pay, viz: "increased professional knowledge and experience in officers." Both this case and that of Brown, where similar language is used, (Ib. 545,) were affirmed here (113 U. S., 310, 568).

Appellants' brief (p. 6) distinguishes this case from Hartwell's, by saying that appellant's office was dependent on the service of the paymaster with whom he served, and that vacating the office of the latter would have affected the tenure of the former. This does not appear except by inference from the regulation, quoted on the preceding page, stating that acceptance of appointment shall be understood as binding the clerk to serve with such paymaster until regularly discharged. (This means, of course, until the clerk is regularly discharged). But the acceptance itself, however understood, does not contain such a clause. (See form in Mouat, record p. 3). It binds the clerk, during his service, "to comply with and be obedient to such laws, regulations, and discipline of the Navy, as are now in force, or that may be enacted by Congress or established by other comptent authority."

But admitting appellants inference to be correct, it is not the only or principal test laid down in U. S. *vs.* Hartwell. Claimants duties were continuing and permanent, not occasional or temporary, not "limited in duration and specific in objects," or with "defined rights and obligations." His pay was fixed at an

annual rate, (R. S. 1556,) subject to alteration at any time without his consent.

Very different from the case of a mere contract, like that in U. S. *vs.* Germaine, (99 U. S. 508,) to which this case is sought to be assimilated.

The contract of a paymaster's clerk is found in his oath, which binds him to "faithfully discharge the duties of his office." (Mouat Record, p. 3). If he holds no office, as appellants contend, his oath is not binding and he cannot be punished for violating it. And if he holds an office, then he is an officer.

But if it be argued that while the office existed, (as we think evident from the statutes providing a salary for it), the mode of appointment was illegal, the answer is, that the intent of the act of 1883 was to give credit for actual service, whether *de jure* or simply *de facto*. Such has been the construction placed on the statutes giving longevity pay in both the Army and Navy. (Bennett's, Palen's and Muse's cases, 19 C. Cls., 387, 394 and 444. See also Young's case, *Ib.* 152, and Thornley's and Brown's cases, *supra*).

U. S. *vs.* Dunn, (120 U. S., 249,) was a case under this same act of 1883. Dunn entered the Marine Corps as an apprentice boy, "bound to learn music," and seems to have performed his contract, since he was afterwards rated as a fifer. The court, construing the act broadly, held that his service might be credited to him as that of an "enlisted man in the Army or Navy, or both." On this authority there would seem to be no difficulty in regarding a paymaster's clerk as an enlisted man within the meaning of the act, if the technical objections to his being regarded as an officer are found to be insurmountable. No form of enlistment is prescribed for the Navy, either by the Constitution or the Statutes, and the term, in its ordinary meaning, is broad enough to include any volun-